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Supreme Court of the United States.

OCTOBER TERM, 1918.

No. 889.

BANKERS TRUST COMPANY, as Trustee,
Appellant,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY and NEW ORLEANS PACIFIC RAILWAY COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION.

BRIEF ON BEHALF OF APPELLEE, THE TEXAS AND PACIFIC RAILWAY COMPANY.

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Supreme Court of the United States.

BANKERS TRUST COMPANY, as Trustee, Appellant, v. THE TEXAS AND PACIFIC RAILWAY COMPANY, NEW ORLEANS PACIFIC RAILWAY COMPANY, Appellees.	Term No. 889.

BRIEF OF THE TEXAS AND PACIFIC RAILWAY COMPANY, APPELLEE.

Additional Statement of the Case.

Appellant's statement of the case is substantially correct. We add, however, that it affirmatively appears from the Bill of Complaint that interest upon the second mortgage income bonds is only payable out of the net income of the Railway Company as the same may be determined by its Board of Directors, and it appears from the Bill that if any interest is in default it would require an accounting for the purpose of ascertaining the amount, as the coupons upon their face show that interest is payable only in the event it is earned (Tr., 53, 55).

The following further facts should perhaps be given emphasis:

(*a*)

In Paragraph II. of the Bill of Complaint, after reciting that The Texas and Pacific Railway Com-

pany is a corporation duly created under the laws of the United States and has its principal place of business and its principal operating and general offices in the City of Dallas, Texas, it is alleged that the defendant The Texas and Pacific Railway Company is a *resident* and *inhabitant* of the Dallas Division of the Northern District of Texas. It is nowhere alleged that The Texas and Pacific Railway Company is a *citizen* of the State of Texas (Tr., 2).

(*b*)

The Act incorporating The Texas and Pacific Railway Company provided among other things, that the persons named in the first section of the Act should constitute a Board of Commissioners who should meet in the City of New York within ninety days after the passage thereof * * * and cause books to be opened for the subscription of capital stock, and that it should be lawful for such subscribers or stockholders to organize the company in accordance with the provisions of the Act, and to elect Directors, which said Directors should immediately proceed to elect a President. (Act of March 3, 1871, 16 Stat., 573).

(*c*)

Paragraph IV. of the Bill of Complaint expressly alleges that by virtue of its act of incorporation and the provisions therein included authorizing the The Texas and Pacific Railway Company to sue and be sued, plead and be impleaded, defend and be defended in all courts of law and equity within the United States, jurisdiction was conferred upon the District Court of the United States at Dallas (Tr., 4).

(*d*)

Paragraph XXXVI. of the Bill of Complaint expressly alleges that the suit is one of a civil nature in

equity, and the matter in controversy exceeds the sum of $5,000.00, and arises under the Constitution and laws of the United States (Tr., 45).

(*e*)

It is nowhere alleged in the Bill of Complaint that The Texas and Pacific Railway Company is a citizen of the State of Texas, or that the District Court of the United States for the Northern District of Texas has jurisdiction of the cause by reason of same being a suit between citizens of different states.

It will be convenient to discuss the three general grounds of federal jurisdiction relied on by the appellant in the order in which they are presented in the appellant's brief.

BRIEF OF THE ARGUMENT.

I.

Can jurisdiction be maintained by virtue of a grant thereof in the charter of The Texas and Pacific Railway Company?

In reply to the contention that jurisdiction of such suits as this against The Texas and Pacific Railway Company was expressly vested in appropriate Federal Courts by the Act of Congress of the United States incorporating the Company, we make the following propositions:

FIRST: The Act of Congress of the United States creating The Texas and Pacific Railway Company and which provides that it shall be able to "sue and be

sued, plead and be impleaded, defend and be defended in all courts of law and equity within the United States" was not intended to enlarge the jurisdiction of any particular court, but was to give a capacity to the corporation to appear as a corporation in any court which would by law have cognizance of the case if brought by individuals.

SECOND: Where there is no general law giving to the Courts of the United States jurisdiction of suits by or against a corporation created by an Act of Congress, in order to confer special jurisdiction upon such Courts, it must clearly appear that such jurisdiction was conferred by special grant and in express terms.

THIRD. At the time The Texas and Pacific Railway Company was incorporated by an Act of Congress, there was no general law giving to federal courts original jurisdiction of suits "arising under the laws of the United States," and if it be true that the Act incorporating The Texas and Pacific Railway Company did confer jurisdiction on appropriate courts of the United States, the jurisdiction so conferred has been withdrawn by the Act of Congress of January 28, 1915.

AUTHORITIES.

Act of March 3, 1871 (16 Stat., 573); Act of March 3, 1875 (18 Stat., 470); Act of January 28, 1915 (38 Stat., 803); *Bank of the United States vs. Deveaux and others*, 5 Cranch., 61; *Osborn vs. Bank of the United States*, 9 Wheat., 738; *Pacific Railroad Removal Cases*, 115 U. S., 1; *Rodgers vs. United States*, 185 U. S., 83; *Smith vs. Union Pacific Railroad Company*, 2 Dill., 278.

Argument.

In order that we may ascertain precisely what was meant in the Act incorporating The Texas and Pacific Railway Company, (16 Stat., 573) wherein it is provided

that such corporation "shall be able to sue and be sued, plead and be impleaded, defend and be defended in all courts of law and equity within the United States", we desire briefly to reviewthe law concerning the jurisdiction of federal courts as it then existed, and the decisions of this Court bearing upon this question.

Under the Constitution of the United States (Art. III, Sec. 2) the judicial power of the United States was confined to four classes of cases, viz.: (1) to cases in law and equity arising under the Constitution of the United States, the laws of the United States, and treaties made under their authority; (2) to cases affecting ambassadors, public ministers and consuls; (3) to cases of admiralty and maritime jurisdiction; and (4) to certain controversies depending upon the character of the parties.

Suits by or against a federal corporation could not as such belong to any of these classes, except to the first, that is, to cases in law and equity arising under the Constitution of the United States and under the laws and treaties of the Unit d States (*Pacific Railroad Removal Cases*, 115 U. S., 1, 12).

In the case of *Bank of the United States vs. Deveaux* (5 Cranch. 61, *Feb. Term*, 1809), it appeared that the Bank of the United States was incorporated by an Act of Congress of the United States. By the Judiciary Act of 1789 then in force (1 Stats., 83) the jurisdiction of the Circuit Courts of the United (then the trial courts) was (with a single exception not here important) extended only to cases where the constitutional right to plead and be impleaded in the Courts of the Union depended upon the character of the parties, and did not embrace suits "arising under the laws of the United States."

As was then understood, and as was more completely demonstrated in the later case of *Osborn vs. Bank of the United States*, a suit against a federal corporation was a suit "arising under the laws of the United States," but there being no general law giving the Circuit Court jurisdiction over a suit "arising

under the laws of the United States," the question necessarily arose whether the Circuit Court did have jurisdiction over suits by and against the Bank by virtue of express powers and grants contained in the act of incorporation. It was insisted by the able counsel for the Bank that the grant of power therein made "to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended in courts of record or any other place whatsoever" fully vested the Circuit Court of the United States with express jurisdiction of all suits by or against the Bank. In answer, however, to this argument Chief Justice MARSHALL used the following convincing language (p. 83):

> "This power, if not incident to a corporation, is conferred by every incorporating act, and is not understood to enlarge the jurisdiction of any particular court, but to give a capacity to the corporation to appear, as a corporation, in any court which would, by law, have cognizance of the cause, if brought by individuals. *If jurisdiction is given by this clause to the federal courts, it is equally given to all courts having original jurisdiction, and for all sums, however small they may be.*"

At the time The Texas and Pacific Railway Company was incorporated by Congress (1871) this holding had never been questioned by any decision of this Court.

It must, therefore, be assumed that when it created the Texas and Pacific Railway Company and gave to it practically the same power to sue and to be sued, as was contained in the first act creating the Bank of the United States, Congress understood the construction placed upon the use of these terms as defined by Chief Justice MARSHALL in the case of *Bank vs. Deveaux.*

Then again, in the case of *Osborn vs. Bank of the United States* (9 Wheat., 738, *Feb. Term* 1824) it appeared that the Congress of the United States had recognized the force of the decision in the Deveaux

case, *supra*, and after enacting the general provision that the Bank should be able in law to "sue and be sued * * * in all State courts having competent jurisdiction", had added an express grant in words as follows: "*and in all circuit courts of the United States.*"

Recurring to the case of *Bank vs. Deveaux,, supra*, it will be noted that Congress in the charter there under consideration, had granted express jurisdiction to federal courts in certain classes of suits, to wit: specific cases of mal-administration on the part of certain officers of the bank.

Observing the clear rule of law as laid down by this Court in the cases above referred to, and the fact that Congress, when incorporating the Bank of the United States in the second instance, had recognized that in order to confer federal jurisdiction it was necessary to do so in express terms, provided that the Bank should have the right to sue and be sued "*in all circuit courts of the United States*", and, bearing in mind that this rule of construction had never been questioned by this Court, it seems unquestionable that if Congress had intended to confer special jurisdiction upon courts of the United States, when it incorporated The Texas and Pacific Railway Company, it would have conferred such jursdiction in clear terms as was done in the act of incorporation considered in the case of *Osborn vs. Bank, supra*. Not having done so, but having on the contrary used the general words substantially contained in the Federal Act of incorporation considered in the Deveaux case, there can be no escape from the conclusion that Congress intended said general words to mean exactly what Chief Justice MARSHALL said they did mean in the Deveaux case.

By the Judiciary Act of March 3, 1875 (18 Stat., 470), Congress for the first time gave to the Circuit Courts of the United States general original jurisdiction of suits "arising under the laws of the United States," and it has been by virtue of this Act and its supplements, and to a limited extent the special

removal Act of 1868, that the Circui tCourts have exercised jurisdiction over suits by and against the Texas and Pacific Railway Company. Mere general terms as used in the charter wou d not have been sufficient.

As against this contention we are cited to the case of *Smith vs. Union Pacific Railroad Company* (2 Dill., 278), where Mr. Justice MILLER, presiding, rendered the short opinion quoted in the brief of counsel for appellant herein. The learned Judge did not attempt to discuss the position taken by him, nor to justify his conclusion by any line of reasoning or citation of authorities. We are, therefore, unable to understand what line of reasoning was adopted to r ach the conclusion which he did reach. If we may be permitted to criticise the opinion of so able and learned a Judge, we may here say that even in reaching the conclusion announced by him he was forced to add something to the statutory provision contained in the charter of the Union Pacific Railroad Company. The provision simply gave to the Railroad Company the right to sue and be sued, in all courts of law and equity within the United States. If this was an express grant of jurisdiction to the federal courts, it would necessarily follow that such jurisdiction would exist with ut limitation as to amounts, or the questions involved. Mr. Justice MILLER apparently qualified this grant by limiting it to such cases as th federal courts would have jurisdiction of between other parties. In other words, as we understand the opinion, if in suits between other parties the federal courts only had jurisdiction where the amount exceeded a given sum, then this express grant contended for would be limited to such suits as involved a similar amount, when in truth and in fact no such limitation was expressed in the grant contained in the charter. The appellant contends that these views were carried forward in the dissenting opinion filed in the *Pacific Railroad Removal Cases*, where Chief Justice WAITE, speaking for himself and Mr. Justice MILLER, stated: "Neither do I doubt that

Congress did, in the charters under which these corporations exist, authorize suits by or against them to be brought in any of the courts of the United States as well as in the courts of the State." It is evident, however, that Mr. Justice BRADLEY, speaking for a majority of the Court, did not entertain such a view, but to the contrary, adopted the view of Chief Justice MARSHALL in the case of *Osborn vs. Bank*, *supra*, and held that a suit by or against a corporation of the United States was a suit " arising under the laws of the United States ", and followed that with an application of the Act of 1875, which granted to the Circuit Courts of the United States jurisdiction of suits " arising under the laws of the United States ", and having concluded that a suit against a Federal Corporation was a suit " arising under the laws of the United States ", reached the conclusion that the suits referred to in the opinion were suits of which the Circuit Court of the United States had jurisdiction under the Act of 1875.

Reference is had in the brief of appellant to its counsel's view of the history of the times when The Texas and Pacific Railway Company was chartered. It is said therein that " the greater part of the country through which it was to pass was in the hands of Indians, Mexicans and pioneers. As to the remainder, the prevailing conditions were even worse, for those were the days of reconstruction when the carpet bagger and Ku Klux clansmen were struggling for control."

From this it is argued that the persons securing the charter of The Texas and Pacific Railway Company, as well as Congress did not desire to have the legal affairs of the Company submitted to state courts where the Indian, Mexican, pioneer, carpet bagger and Ku Klux clansman might possibly be a judge or juror and therefore thought it wise to extend the protection of the federal courts over suits either by or against it.

As far back as, approximately, the year 1800, it is to

be observed that Congress was willing to give to the United States Bank the right of federal jurisdiction. In the first instance, *Bank vs. Deveaux* (5 Cranch, 61), it was limited to certain cases growing out of the maladministration of its officers. In the second instance, *Osborn vs. Bank* (9 Wheat., 738), it was conferred generally. At those dates, if we read history correctly, the carpet bagger and the Ku Klux clansmen were unknown and we are not advised that either the Indian or Mexican was a menace to the enforcement of the law. It is true, the pioneer was a factor in the civilization of the country but this is the first time we have ever heard of a strong and sturdy class of people being considered a menace in the administration of the laws of our country.

It does occur to us, however, that if Congress had in mind the terrors of the "carpet baggers" and "Ku Klux Clansmen", and, therefore, desired to throw around The Texas and Pacific Railway Company the protection of the federal court it would have made federal jurisdiction *exclusive* and the charter would have contained a clear grant such as was contained in the second charter of the Bank of the United States. In other words, if express jurisdiction was intended to be conferred on the federal courts, would not Congress have stated the ground as follows:

> And shall be able "to sue and be sued, plead and be impleaded, defend and be defended in all state courts of competent jurisdiction within the United States *and in the circuit courts of the United States.*"

Congress, however, did not do so but to the contrary, used the same general terms as were contained in the charter considered in the Deveaux case which had been expressly decided by Chief Justice MARSHALL to confer no federal jurisdiction whatever.

Would it not be appropriate here to observe assuming the horrors of the Indian, Mexican, carpet

bagger and Ku Klux clansman to have been the producing cause for conferring federal jurisdiction upon The Texas and Pacific Railway Company by its Act of Incorporation, that after such conditions had passed away Congress by virtue of the Act of 1915 treated the case as one of removed danger and therefore withdrew the jurisdiction originally created for a special purpose?

If it should be conceded that the power to sue and be sued contained in the charter of The Texas and Pacific Railway Company, conferred jurisdiction upon United States courts of suits by and against that Company, the effect of the Act of January 28th, 1915, would be to supersede such jurisdiction as to this case. In the absence of the Act of 1915, the United States court would undoubtedly have had jurisdiction of this case under Section 24 of the Judicial Code, as one involving an amount exceeding $3,000.00, and arising under a law of the United States. If the charter constitutes a grant of jurisdiction the court likewise would have had jurisdiction *on that ground.* Either source of jurisdiction would have been all sufficient. We cannot assume that Congress by the Act of 1915 intended to strike down one source and leave the other completely efficient. This would have been a vain thing. The Act of 1915 must be construed as superseding *all* jurisdiction of the cases covered by it, regardless of whether such jurisdiction arose by grant in the charter, or federal question arising thereout. A discussion of the effect of the Act of 1915 is more appropriate under the next main subdivision of the argument, and we need only here refer very briefly to the theory on which the appellant suggests that the alleged charter jurisdiction survives the Act of 1915.

In this connection appellant invokes the rule that a general act does not ordinarily repeal an earlier special act, and asserts that if the grant of power to sue and be sued, as contained in the Railway Company's charter be treated as conferring jurisdiction, it re-

mains unaffected by the Act of 1915, for the reason the charter is a special law and the act of 1915 is a general law.

The rule invoked is elementary but it has no application here. Like all rules for the interpretation of statutes, its *only* office is to aid in the ascertainment of the legislative intent. If the intent is otherwise obvious the rule is without application, and in no case can it be applied to prevent the accomplishment of the purpose of the law making body. It is a fact, judicially known to this Court, *and uncontroverted*, that the Act of 1915 does not apply to any railway corporation except The Texas and Pacific Railway Company. It was aimed solely and directly at this Company and was introduced in Congress by Mr. Beall, representative from Dallas (Texas) district.

Representative Floyd, on behalf of the Judiciary Committee of the House, said, of the original bill (52 Cong. Record, 283) :

> " This bill was introduced by the gentleman from Texas (Mr. Beall) and *The Texas & Pacific Railway Company* operating in Texas was incorporated by Act of Congress and is the only road in the State of Texas that has the right to transfer its cases to the federal court on the ground that it was incorporated by Congress, thereby giving it an advantage over other railroad corporations operating in the State of Texas."

Senator Chilton, in reporting to the Senate an amendment to the House Bill, which amendment was adopted and is the present law, said (52 Cong. Record, 1544) :

> " The next amendment is to remedy the following situation : There is *one railroad company in the United States* that is incorporated under the laws of the United States, and that railroad company clogs the records of the Supreme Court by taking all of its cases to that court on the ground

> that as it is a corporation organized under the laws of the United States there arises a question under the laws of the United States."

The Senate report referred to by Senator Chilton contained the following (52 Cong. Record, 434–5):

> "It is believed that The Texas & Pacific is now the only railroad in this country which will be affected by this provision."

In light of this record, it is useless to invoke the canon of construction that a general does not ordinarily repeal a special act. In this instance the general law, so called, is special in fact, aimed solely at the corporation created by the special act, *and operative only as against that corporation.* An application in such a case of the rule invoked would accomplish the opposite of what it is intended to accomplish, and would nullify the Act of 1915, and leave it without subject matter upon which to take effect. But even assuming that the rule could be applied, the special act in this instance has been repealed within the requirements of the rule itself, because in the language of Mr. Justice BREWER quoted at page 34 of the brief of Appellant,

> "the provisions of the general are manifestly inconsistent with those of the special."

II.

Can jurisdiction be maintained by virtue of a federal question?

Answering appellant's contention that the trial court had jurisdiction of this case on the ground of the existence of a federal question notwithstanding the

act of January 28th, 1915, we submit the following propositions:

FIRST: The only federal questions that could arise on the face of the appellant's Bill of Complaint are such as would arise out of and be presented by an allegation that The Texas and Pacific Railway Company was "incorporated under an Act of Congress," and since the passage of the Act of January 28th, 1915, questions so arising, though "inherently" federal, are no longer sufficient to confer jurisdiction upon United States Courts.

SECOND: The Bill of Complaint discloses no actual dispute or controversy as to the meaning of an Act of Congress upon the determination of which the result of the suit depends.

AUTHORITIES.

Act of March 3, 1875 (18 Stat., 470); Act of March 3, 1887 (24 Stat., 552); Act of August 13, 1888 (25 Stat., 433); Act of January 28, 1915 (38 Stat., 803); 237 Judicial Code; *Butler vs. Shafer*, 67 Fed., 161; *Cooke vs. Avery*, 147 U. S., 375; *Fitzgerald vs. Missouri Pacific Railway*, 45 Fed., 812; *Gold-Washing Water Company vs. Keyes*, 96 U. S., 199; *Huff vs. Union National Bank*, 173 Fed., 333; *Herrmann vs. Edwards*, 238 U. S., 107; *Joy vs. St. Louis*, 201 U. S., 332; *Leather Manufacturers' Bank vs. Cooper*, 120 U. S., 778; *Lovell vs. Newman*, 227 U. S., 412; *McGoon vs. Northern Pacific Railway Company*, 204 Fed., 998; *Norton vs. Whiteside*, 239 U. S., 144; *Osborn vs. Bank of United States*, 9 Wheat., 738; *South Carolina vs. Virginia-Carolina Chemical Company*, 117 Fed., 727; *Shulthis vs. McDougal*, 225 U. S., 561: *Shoshone Mining Company vs. Rutter*, 177 U. S., 505; *Washington vs. Island Lime Company*, 117 Fed., 777; *Foster's Federal Practice*, § 24.

Argument.

The Act of January 28th, 1915, is :

> " No court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that said railroad company was incorporated under an act of Congress. '

In order that we may have a clear appreciation of the scope of this Act, it will be necessary to refer to the cases establishing the rule of decision it was the evident purpose of the act to *reverse.*

The doctrine that the powers exercised by a corporation created by act of Congress were called in question by every suit by or against such corporation, and therefore that each such suit involved a federal question, justiciable in a United States court, was first enunciated by Chief Justice MARSHALL in the case of *Osborn vs. Bank*, 9 Wheat., 738, before mentioned. In that case the question presented was as to the power of Congress to authorize the Bank of the United States to sue and be sued in the United States Circuit Courts. The power depended upon whether or not a suit by or against the bank arose under the laws of the United States.

The Chief Justice, answering this question in the affirmative, said (p. 823) :

> " We think, then, that when a question to which the judicial power of the Union is extended by the Constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or law may be involved in it.
>
> " The case of the Bank is, we think, a very strong case of this description. The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to

acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that the charter is a law of the United States. It is not only itself the mere creature of law, but all its actions and all its rights are dependent on the same law. Can a being, thus constituted, have a case which does not arise literally, as well as substantially, under the law.

Take the case of a contract, which is put as the strongest against the Bank.

"When a bank sues, the first question which presents itself and which lies at the foundation of the cause is, has this legal entity a right to sue? Has it a right to come, not into this Court particularly, but into any Court? This depends on a law of the United States. The next question is, has this being a right to make this particular contract? If this question be decided in the negative the cause is determined against the plaintiff; and this question, too, depends entirely upon a law of the United States.

"These are important questions and they exist in every possible case."

* * * * * *

"The question forms an original ingredient in every cause. Whether it be in fact relied on or not, in the defense, it is still a part of the cause and may be relied on. The right of the plaintiff to sue, cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense, and must depend on the state of things when the action is brought. The questions which the case involves then, must determine its character, whether those questions be made in the cause or not."

The first case specifically involving the application of the principles laid down in the Osborn case,

to suits by or against railway corporations created by an Act of Congress, is reported as the *Pacific Railroad Removal Cases*, 115 U. S., 1, *Oct. Term, 1885*. That case involved the removal of suits brought in various state courts against the Union Pacific Railway Company, a corporation also chartered by Congress, and The Texas and Pacific Railway Company. Certain of the cases, upon removal, were remanded to the state courts on the ground that they did not involve a federal question. The Supreme Court of the United States reversed this ruling, Chief Justice WAITE and Justice MILLER dissenting, and held that the cases involved federal questions, in that the powers of the railways were derived from federal charters. This Court did not discuss the question at great length, but quoted and applied the language of Chief Justice MARSHALL in Osborn vs. Bank, above referred to.

The principle of the Osborn Case was well stated by Justice BREWER in delivering the opinion of this Court in *Shoshone Mining Company vs. Rutter*, 177 U. S., 505, *Oct. Term, 1899*, where it is said (pp. 509-10:

> "As against this we are met by these suggestions: First, that a corporation created by Congress has a right to invoke the jurisdiction of the federal courts in respect to any litigation which it may have, except as specifically restricted by some act of Congress (*Osborn v. Bank of the United States*, 9 Wheat., 738, *Pacific Railroad Removal Cases*, 115 U. S., 1.
>
> "The argument of Chief Justice MARSHALL in support of this was, briefly, that a corporation has no powers and can incur no obligations except as are authorized or provided for in its charter. Its power to do any act which it assumes to do, and its liability to any obligation which is sought to be cast upon it, depend upon its charter, and when such charter

> is given by one of the laws of the United States *there is a primary question of the extent and meaning of that law.* In other words, *as to every act or obligation the first question is whether that act or obligation is within the scope of the law of Congress, and that being the matter which must be first determined, a suit by or against the corporation is one which involves the construction of the terms of its charter.* In other words, a question arising under the law of Congress."

Under these decisions, and the Act of March 3, 1875 (18 Stat., 470) ; the Act of March 3, 1887 (24 Stat., 552) ; the Act of August 13, 1888 (25 Stat., 433), and Section 24 of the Judicial Code, all suits by or against The Texas and Pacific Railway Company involving the necessary jurisdictional amounts, were cognizable, and numbers of them were actually tried, in the United States Circuit and District Courts, and numbers of them were brought to this Court for review.

In the judgment of Congress it was not wise that this should be permitted to continue, and its evident purpose was, by the Act of 1915, *so far as jurisdiction in United States courts was dependent upon the existence of a federal question,* to put The Texas and Pacific Railway Company upon an even keel with railroad corporations chartered under the laws of the states ; but to leave its right *otherwise* to resort to the federal courts unimpaired and unchanged. If by a confiscatory rate prescribed by a State Commission, the property of a state railroad should be taken without due process of law, it could, presenting this federal question, resort to the United States courts for redress and to exactly the same extent could resort be had by The Texas and Pacific Railway Company to such courts. It could resort to said courts in any case involving a federal question arising *otherwise* than *out of its congressional charter,* that is, otherwise than, " upon the ground that said railroad company was incorporated under an Act of Congress."

The contention is made that the purpose of the act of 1915 was to deprive the federal courts of jurisdiction in cases where such jurisdiction was based *solely* on the *fact* that The Texas and Pacific Railway Company was created by an act of Congress, and a distinction is sought to be made between jurisdiction arising from the *mere fact* of incorporation by Congress, and that arising out of the potential necessity, in all cases, of interpreting and applying the powers granted by Congress in the act of incorporation.

This distinction was the burden of appellant's contention in the Court below. It did not find favor with the learned District Judge, and his position thereon, which seems to us unanswerable, is clearly stated in his memorandum opinion set out at length on pages 139–142 of the transcript, to which we invite careful attention.

We confess an inability to grasp the distinction, and confidently assert it does not, and in the nature of things cannot, exist. Not only does it not exist, but its existence would be wholly inconsistent with the Osborn case, the plain effect of which is, that a suit by or against a federal corporation raises a federal question *only* because it necessarily involves a consideration of the extent and effect of its corporate powers.

The act of 1915, in light of the circumstances out of which it arose, is not obscure or difficult of construction :

> "No court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that said railroad company was incorporated under an Act of Congress."

The first part of the sentence is too plain for discussion, "No court of the United States shall have jurisdiction of any action or suit *by* or *against* any railroad company."

This of necessity includes the United States District Courts and it includes all suits *brought by* the railroad company and all suits *brought against* it. The language could not be plainer. Appellant in the trial court conceded that the act could not be restricted to removable suits. Its brief in this Court indicates that it should be so restricted. Congress understood that suits brought *by* The Texas and Pacific Railway Company could not be removed, and yet, in unmistakable language, it took away jurisdiction in suits brought *by* as well as *against* the company. If we restrict the act to removal suits, we *must* strike from it the words "by or" and thereby completely nullify *one-half* thereof. By no permissible interpretation can the act be so mutilated.

While the meaning of the latter part of the act of 1915, that is, "upon the ground that said railway company was incorporated under an act of Congress," is plain, the language is not exact. No court of the United States has ever had jurisdiction, and could not under the Constitution have jurisdiction, of a suit by or against a railroad company, "upon the ground that said railroad company was incorporated under an Act of Congress." This statement may be verified by referring to the Judiciary Acts. But Congress has the power under the Constitution to confer jurisdiction upon the federal courts of all controversies "arising under the laws of the United States," and in all judiciary acts since and including that of 1875 it has specifically vested jurisdiction in the federal court of all such controversies within prescribed amounts. Under these acts, suits by and against federal corporations have been entertained in the United States courts, but in all such cases said courts took jurisdiction because the cases arose "under a law of the United States," *and for no other reason whatsoever.* This is true in respect of all the cases cited by the appellant, involving The Texas and Pacific Railway Company. As this Court had established the doctrine that a corporation chartered by Congress could not

by any possibility have any litigation that did not involve the construction and effect of its charter, it of necessity became axiomatic that a corporation created by Congress could not have any litigation that did not involve a *federal question.* Therefore, an allegation that a corporation, plaintiff or defendant, was incorporated by an Act of Congress, was the exact legal equivalent of an allegation that the given case "arose under the laws of the United States"—involved a federal controversy—to wit, the construction and effect of a congressional charter.

And it thus became the universal practice, when The Texas and Pacific Railway Company was sued, and when grounds of jurisdiction were being stated in opinions of courts, for the pleader or the judge to state that jurisdiction was predicated upon the fact that the company "was incorporated under an Act of Congress," and there stop. By this brief formula, having a stereotyped legal significance, approved by repeated decisions, the existence and extent of the federal question were fully and accurately set forth.

Does not the language "upon the ground that said railroad company was incorporated under an Act of Congress" plainly manifest the purpose of Congress to take away from United States Courts jurisdiction dependent upon all such federal questions as were raised and presented by the allegation that the corporation, plaintiff or defendant, "was incorporated under an Act of Congress?" Can it by any possibility be construed to mean less than this? We submit that it cannot, and that the jurisdiction taken away from the United States courts by the act of 1915 is *co-extensive* with the federal questions held by this court in the Osborn case and those following it, to have arisen and to have been tendered in issue, by the allegation of the existence of a federal charter.

So far, and to the exact extent, that the allegation of a federal charter, in suits by or against The Texas and Pacific Railway Company, raised federal questions, just so far, and to that exact extent, does the act of

1915 destroy the *jurisdictional quality* of such questions.

The Act of 1915 was intended to strike down for jurisdictional purposes the inherent and ever present federal questions which under the decisions of this court in the Osborn and subsequent cases had been treated as raised and tendered in all suits by and against federal corporations by the mere allegation of the existence of a federal charter. We may assume it was not intended to go beyond this, but certainly it was not intended to stop short of it, and to leave an undefined territory in which a federal question would be raised by the allegation of the existence of a federal charter, which question, nevertheless, would *not* be encompassed by the Act.

Reduced to its last analysis, the case simply is, what questions are raised by the allegation of a federal charter? Let the mind revert to the language of Chief Justice MARSHALL in the Osborn case, or to the language of Justice BREWER in the Shoshone case, and the question is easily answered. The allegation that a corporation is created by an act of Congress, advises the court that the Act of Congress must be considered in order to determine whether the corporation has the right to sue, and this being determined, whether or not under its charter powers it had the right to make the particular contract sought to be enforced. It may be that, as in the suit at bar, the pleader *unnecessarily* sets forth the powers of the corporation, or it may be that no allegation is made other than that the corporation is created under an act of Congress. The legal effect, however, of these allegations is precisely the same, as this Court takes judicial cognizance of the fact that The Texas and Pacific Railway Company was created by an Act of Congress, and takes judicial cognizance of every syllable of the Acts of Congress creating it.

Our views as to the scope and effect of the Act of 1915 may be accentuated by the following illustrations:

John Doe sues The Texas and Pacific Railway Company for a personal injury, alleging that he is a resident of Dallas County, Texas, and that defendant is a railroad company "incorporated under an act of Congress," having an agent in Dallas County. Under the doctrine of the Osborn Case this allegation would raise and tender an issue as to the construction and effect of the Company's charter and would bring into question the rights, powers and duties of the corporation thereunder. Will any one deny that the jurisdiction of a suit such as this was taken away from the federal courts by the Act of 1915? We think not. Yet will any one deny that the allegation raised and tendered in issue a federal question? Surely not.

The case we have put involves a *tort*. Let us illustrate with a suit in contract.

John Doe sues The Texas and Pacific Railway Company to recover the contract price of 50,000 cross-ties sold and delivered to the company, or to recover the price agreed to be paid for constructing 10 miles of main line, alleging in either case that the Railway Company "was incorporated under an Act of Congress." This allegation would raise a federal question, to wit, the right and power of the Company under its charter, in the one case to make a contract to purchase and pay for cross-ties, and in the other case to make a contract for the construction of a portion of its railways. The questions thus presented are most distinctly federal under the Osborn case, and they would be raised by the mere allegation of a federal charter, just as in the *tort* case mentioned. Has the federal court jurisdiction of such controversies as those last mentioned? Or was the jurisdiction taken away by the Act of 1915? Manifestly it was taken away in such cases, if taken away in the first case mentioned. The jurisdictional allegation in both cases is exactly the same, the federal questions presented and tendered *and susceptible of being actually litigated* a e precisely the same. If the Act of 1915 covers the first, there is no possibility of excluding from its operation the second.

Again, John Doe sues The Texas and Pacific Railway Company to obtain a judgment on bonds issued by said company, and to foreclose a mortgage securing them. He alleges that The Texas and Pacific Railway Company is a corporation "incorporated under an act of Congress"—and stops. As in the other cases put, the court judicially knows every syllable and line of the charter of The Texas and Pacific Railway Company, and its powers thereunder, and gives them t e same consideration and effect when not alleged as when alleged. In this case, as in the first, involving a tort, a federal question is raised and tendered; the construction and effect of the charter is in issue. Does the Act of 1915 apply to this last case? If not, why not? The pleading raising the jurisdictional question is in the exact language put in the other cases. It is in the language used by John Doe when he sued for tort—in the language used by John Doe when he sued upon contract. The same jurisdictional allegation is of necessity bound to tender and present to the defendant, for actual controversy, if he likes, the same federal questions. Things equal to the same thing must of necessity be equal to each other.

If the Act of 1915 applies in the first case, why does it not apply as well to the last? If it applies to the second, why not to the third? If it applies to one, why does it not apply to all? Is not the conclusion irresistible that if it applies to one it applies to all, and that if it does not apply to all it does not apply to any? And if it does not apply to any it is nugatory and a farce. If we do not include or exclude all, where shall we draw the line? Shall we include cases of the first and second classes and exclude those of the third? Or exclude those of the second and third, and include those of the first? And upon what principle?

The obvious answer to all these questions is that the federal questions tendered in each case, whether the defendant avails itself thereof and converts them into "actual" controversies or not, are the same, and that under the allegations supposed an issue is tendered as

to the construction and effect of the charter—not one part of it rather than another, *but every part thereof.* That the Act of 1915 was intended to deprive of jurisdictional force the questions so arising *out of the charter* seems certain almost to the point of demonstration, in light of the principles announced in Osborn's case.

Appellant's first proposition on page 41 of its brief, to the effect that there exist in this case federal questions giving rise to federal jurisdiction, *unless* such jurisdiction has been taken away by the act of 1915, is correct. We not only concede this, but we will go further and admit that the *same* federal questions are now presented in cases by or against The Texas and Pacific Railway Company as were presented before the Act of 1915. All we contend for is that *such* federal questions, in light of the Act of 1915, are no longer, under the fiat of Congress, sufficient to confer jurisdiction on United States Courts.

Appellant seeks to draw a distinction between "real" and "constructive" federal questions. It admits that the Act of 1915 supersedes jurisdiction arising from the latter, but not the former.

Appellant prudently refrains from defining "real" or "constructive" nor does it state the difference between them, but it probably uses the term "real" as meaning "actual" and "constructive" as opposed to "actual" that is, existing only in legal contemplation.

The distinction claimed has no legal existence; any federal question is a real federal question. If it is not real, it is unreal, fictitious. There is no such things as a constructive federal question, that is, one existing only in legal contemplation, and not susceptible of being *by the defendant* developed into an actual controversy.

The principle is firmly imbedded in the jurisprudence of this Court, that a federal question, in order to confer jurisdiction, must appear on the face of the plaintiff's complaint, and that it cannot be shown by the defendant's answer. Not only this, but such question must

appear from the allegations *necessary* to set forth the plaintiff's case, and it cannot be deduced from the statement by the plaintiff of *unnecessary* matter. As a corollary it follows that it cannot be shown by matter alleged by the plaintiff in anticipation of defendant's supposed federal defense, for defendant may not make such defense.

This pr mise being established it follows that "real" or "constructive" cannot be predicated of any federal question in this connection. Jurisdiction exists when the plaintiff's complaint is filed, or it never exists. The federal question then arises, or it never arises. It must *then* be real. in the sense of an *actual existence*, or it never will be real. While it must be real, it need not be *active*. Until the defendant answers it can never be known what the active, actual controversy will be. Until that time it can never be known that the federal *question* will ripen into a federal *controversy*,—that the dormant will become quick. But the question presented by the plaintiff must always and in every case be such that the defendant may, if he likes, convert it into an actual live controversy. Therefore, a 'constructive" federal question is logically impossible.

The federal questions raised in the numerous Texas and Pacific Railway cases referred to by appellant, and determined in this and the inferior federal courts, spoken of by appellant as "constructive", were not less real than they would have been had there been in each of those cases a heated controversy as to the validity or effect of some part of the charter of the railway company, or the whole of it. The only warrant that appellant has for speaking of the questions raised as "constructive", is that in point of fact the litigation was finally concluded *without any actual controversy having arisen concerning the charter*. But this was because the parties to said suits did not see fit to make an issue with reference to the charter, or any of the powers thereby conferred. Had they done so, presumably appellant would classify the federal questions so litigated as "real" and not

" constructive "; yet, the federal questions would in either event, have been precisely the same.

In the case at bar the plaintiff *has not suggested in its Bill of Complaint that there is or can be any question as to the validity, construction or effect of the act of Congress creating The Texas and Pacific Railway Company,* nor has the railway in its answer raised any question as to the validity, construction or effect of said Act, and presumably there is not and will not be any controversy whatsoever on these points. Why, therefore, are not the questions presented " constructive " rather than " real "—to use appellants' classification? If at the conclusion of this litigation it should develop that no question as to the validity, interpretation or effect of the company's charter had been raised or determined, would appellant classify the federal questions as " real " or " constructive "? and wherein would be the difference in such event between this case and the numerous Texas and Pacific cases that have gone before?

The Act of 1915 makes no distinction between federal questions. If they arise *out of i. e.* because of the federal incorporation of the company they cease to be jurisdictional in *all* cases, whether they be termed, real, constructive or inherent. Under said act they cease to be jurisdictional in cases in which the defendant may precipitate the most lively contest as well as in cases where no such contest results. All that transpires subsequent to the filing of the bill is wholly immaterial, and cannot give complexion to the jurisdictional situation, which is fully and *finally* determined by what appears on the face of the bill *when it is filed.*

Following its classification of federal questions as " real " and " constructive " appellant asserts that the case in question involves a " real " as opposed to a " constructive " federal question, that is, that " a suit to enforce a railroad mortgage given by a federally chartered company necessarily involves one or more federal questions that are not merely constructive in their character." The " real " question is claimed

to arise from the fact that the suit is to enforce bonds and a mortgage securing them, authorized by the federal charter of the company. As previously stated there is not a suggestion that there is or will be any controversy whatsoever as to the validity of the charter or its meaning or effect. The only real controversy suggested is one involving the interpretation of the *contract* of mortgage, and the *facts* relative to the earning of income thereunder.

By asserting that this situation presents a real federal question appellant can only mean that there inherently exists a federal question, because of the *source* from which the powers of the corporation eminate, and that perforce of this orgin it will be necessary in the course of the litigation to construe and apply an act of Congress. This is all that it can mean, and yet these very questions may all arise—and are all potentially existent and presented—in every suit against a federal corporation, and are *affirmatively* set forth by an allegation of the existence of a federal charter. We thus, no matter from what point we start, get back to Osborn's case, which completely includes all federal questions, no matter with what adjectives they may be qualified, and whatever is included in Osborn's case is likewise included in the act of 1915, and for jurisdictional purposes made *nil*.

Appellant must take one of two positions. It must deny that the existence of a federal charter raises federal questions to the *extent* stated by Chief Justice MARSHALL in the Osborn case, or it must deny that the act of 1915 destroys the jurisdictional effect of *any* federal question; be it deemed "real" or "constructive." It cannot admit, without destroying its position, the full scope of the rule of the Osborn case, and at the same time admit that the Act of 1915 eliminates *any* federal question. If the doctrine of Osborn's case is correct, the Act of 1915 covers all questions arising out of the federal charter powers of the corporation, whether they be designated "real" or "constructive."

Appellant asserts an analogy between the Act of January 28, 1915, and the various Acts of Congress relating to the jurisdiction of the United States court over suits by or against national banks, which acts in substance convert national banks into state corporations, but which do not otherwise deprive them of the right to resort to federal courts in cases involving federal questions.

The Act of 1915 does not attempt to convert The Texas and Pacific Railway Company into a state corporation, but simply to strike down all such federal jurisdiction as grows out of the fact that its powers are derived from a Congressional charter. Outside of its charter, it has precisely the same right, as has been stated, to resort to the United States courts in controversies involving federal questions, as any other corporation or individual. No one would contend, for example, that The Texas and Pacific Railway Company could not sue or be sued in the federal courts, notwithstanding the Act of 1915, in a case involving the validity, construction or effect of the Interstate Commerce Act, or any one of the numerous general laws of the United States bearing upon railway companies.

With one exception, an examination of the Bank cases cited, will show that as to those passed upon by this court the question for determination involved *diversity of citizenship only.* The others come from either the Circuit Court of Appeals or the trial court, and are cases where the court was simply applying some *general statute of the United States applicable to all banks* and was in no sense attempting to apply an act which was a part of the specific charter of the bank. The exceptional case is *Leather Manufacturers' Bank vs. Cooper*, 120 U. S., 778, *October Term, 1886*, a suit instituted by Cooper against the Bank in a state court of New York to recover a balance of account. The Bank removed the suit to the circuit court of the United States on the ground of its being a national bank and that consequently the suit was one

arising under the laws of the United States. Motion to remand was granted, and upon a writ of error this court held, citing the various national banking acts, that the cause was not removable. No diversity of citizenship existed, and no right of removal existed by virtue of defendant being a national bank; therefore, it followed that the only federal question that could have arisen would have been one involving the power of the bank to create the indebtedness upon which suit was brought. We refer to this case as illustrating the proposition that the mere fact that in a suit some power granted by a federal law may come in question, does not of itself give rise to federal jurisdiction and as negatively deciding the contrary of what was held by the District Judge in the Bowers case, referred to on page 49 of appellant's brief. In the other cases, from inferior courts, the banks, by virtue of an Act of Congress, were to be treated as citizens of particular states, and the acts to be applied, and of necessity interpreted, were *general laws of Congress.*

The language of the Acts relating to national banks, is so unlike the language of the Act of 1915, as to make authorities under the one wholly inapposite in a discussion of the other.

Appellant suggests on page 52 of its brief that the validity and effect of the various provisions of the mortgage and bonds sued upon must be determined with reference to the Acts of 1873 and 1874, which it says are not Acts incorporating The Texas and Pacific Railway Company, but only supplementary thereto. The distinction is without merit. The charter of The Texas and Pacific Railway Company consists of the various Acts of Congress giving it life and endowing it with capacities. An Act amending its original charter seems to be conceded to be the law of its being, but an act "supplemental" to the charter is claimed to be otherwise. An Act supplemental to the charter becomes a part thereof as much as though it had been included therein originally, or inserted therein by amendment. The principles to be applied in this case

are precisely the same as if the charter of the Texas and Pacific Railway Company consisted of one instrument, never amended or supplemented.

While we are convinced the foregoing interpretation of the Act of 1915 is correct, we submit, if it is to be construed as distinguishing between federal questions, eliminating some and not others, that appellant's classification is incorrect, and that discrimination should be made between federal questions directly presented and which *must be decided*, and those which, though existent, are collateral and necessarily determinable *only* in the event they are raised and insisted upon by the defendant and the Act construed as applying to the latter but not to the former.

It is settled by numerous decisions of this Court, found in practically every volume since *Gold- Washing Water Company vs. Keyes*, 96 U. S., 199, October Term, 1877, that a suit does not arise under the laws of the United States so as to confer original jurisdiction on federal courts *unless it really* and *substantially* involves a dispute or controversy as to the validity, construction or effect of a law of the United States, *upon the determination of which the result depends.* (*Shulthis vs McDougal, 225 U. S., 561; Lovell vs. Newman, 227 U. S., 412; Hull vs. Burr, 234 U. S., 712; Norton vs. Whitesides*, 239 U. S., 144).

It is also settled under the authorities of this and the inferior federal courts that it is essential to the existence of a federal question sufficient to give the United States courts original jurisdiction, that the validity, construction or effect of the Constitution or an Act of Congress be *directly* in issue. (*South Carolina vs. Virginia-Carolina Chemical Company, 117 Fed., 727; Washington vs. Island Lime Company, 117 Fed., 777; Cooke vs. Avery, 147 U. S., 385; Joy vs. St. Louis, 201 U. S., 434*).

From the foregoing it follows that the fact that in a suit it *may* be necessary to construe or give effect to an Act of Congress, does not give rise to a federal

question sufficient to confer original jurisdiction upon United States courts *(Water Company vs. Keyes, 96 U. S., 199; Butler vs. Shafer, 67 Fed., 161; Fitzgerald vs. Missouri Pacific, 45 Fed., 812; Leggett vs. Great Northern Railway Company, 180 Fed., 314; Foster's Federal Practice, 5th Edition, Vol. 1, § 24).*

And again, it is firmly established that a suit to enforce a right which takes its *origin* in the laws of the United States, is not necessarily, and for that reason alone, one arising under those laws *(Water Company vs. Keyes, 96 U. S., 199; Shoshone Mining Co. vs. Rutter, 177 U. S., 507; Shulthis vs. McDougall, 225 U. S., 569; Lovell vs. Newman, 227 U. S., 420).*

Under the foregoing decisions a plaintiff, in order to maintain original jurisdiction in the federal courts, must in his bill set forth a real and substantial controversy directly involving the validity, construction or effect of an Act of Congress, upon which the result of the suit must depend.

As before stated, there is not a suggestion of question or controversy on the face of appellant's Bill of Complaint as to the validity of the charter, as to its interpretation, or as to any act done under it. The charter is asserted to be valid, and everything done under it in strict conformity thereto. There is no suggestion of question as to the validity, interpretation or effect of the charter to be found within the four corners of the defendant's answer, appellant's assertions to the contrary notwithstanding. But why bother with the answer when it has nothing to do with the question?

It may be conceded that a "real and substantial controversy" is always presented where the action is based *directly upon* or *directly grows* out of a federal statute, for example, a suit to enforce any statutory cause of action, as a marshall's bond. As illustrative, see the discussion in the case of *McGoon vs. Northern Pacific Railway Company, 204 Fed., 998.* The national bank cases of *Walker vs. Windsor and Huff vs. Union National*, cited by appellant on pages

49-51 of its brief, are of this character and were to enforce *directly* a federal statute. A question in cases *directly* involving a federal statute may be classed as actual, because the court in all such suits *must* apply the statute to the facts of the case in order to reach a judgment, and it *cannot* do this without going through the mental process of construing it.

But the case at bar is essentially different from cases of this character. The suit is not to enforce a statute, or a statutory right or cause of action. It does not grow *directly* out of a statute. It is to enforce a bond and mortgage executed, it is true, under authority of a federal charter, but it does not call, except indirectly, and then only at the instance of defendant, for the interpretation of a federal law. At most its *origin* is in a federal law, but that fact does give this Court jurisdiction—does not necessarily raise a federal question.

A suit involving land granted by United States patent under an Act of Congress has been held, time and again, in cases remote and recent, not to give rise to a federal question sufficient to confer original jurisdiction upon the United States courts. The Acts of Congress authorize the issuance of patents; the patents are issued by a United States officer, in pursuance of that authority; they furnish the only title of the patentees; and yet it is uniformly held when such patentees assert title under them, that a federal question is not presented. The origin of the right is a federal statute, but there is no real and substantial controversy as to its validity, meaning or effect unless it be raised by the defendant, and in such event the questions raised would not confer original jurisdiction upon the United States courts, but would have to be brought to this Court through the state courts of last resort under Section 237 of the Judicial Code. One of the most recent cases upon this point and one of the strongest is *Shulthis vs. McDougall*, 225 U. S., 269, to which we respectfully direct the Court's attention.

The analogy between these land cases and the suit in question seems in principle perfect. If the land suit does not present a real and substantial federal controversy it is difficult to see how a suit to enforce the bonds and mortgage in question, can present one. In each case the right asserted goes back to a federal statute—has a federal origin, but in neither case is a federal statute directly or necessarily in controversy.

A suit to cancel a patent because not issued in conformity with the Act of Congress authorizing patents would unquestionably be a suit directly involving a federal question cognizable by original proceeding in the federal courts. *In such case a construction of the laws of Congress could not be avoided.* They would be directly and necessarily in issue, and the court in order to reach a judgment would of necessity have to consider and apply them, even though the plaintiff and defendant might agree as to what they meant.

If the Act of 1915 is to be denied its logical effect under the Osborn case, why may not the rule above suggested be applied, and original jurisdiction be permitted to United States courts in cases *directly* and and *necessarily* involving the validity, construction and effect of the Company's federal charter, leaving all other questions thereunder to be raised and litigated in the state courts, and brought, if necessary, to this court therefrom under Section 237 of the Judicial Code.

See *Herman vs. Edwards, 238 U. S., 112.*

We do not mean to say that this is the proper construction of the Act of 1915; we insist that it is not, but it is the only construction which can be adopted, in light of such decisions as *Shulthis vs. McDougal*, if the Act is to be construed as covering certain, but *not all* of the Federal questions coming within the scope of the principle and the language of Osborn's case.

III.

Can jurisdiction be maintained on the ground of diversity of citizenship?

Answering the contention that jurisdiction can be maintained on the ground of diversity of citizenship Railway Company submits:

FIRST. That the Bill of Complaint fails to allege diversity of citizenship.

SECOND. That if the Railway Company is for jurisdictional purposes to be deemed a citizen of any State —which we dispute—it is not a citizen of Texas, but a citizen of New York.

AUTHORITIES.

Act of March 3, 1887 (24 Stat., 552). *Abercrombie vs. Dupuis*, 1 Cranch, 343; *Bingham vs. Cabot*, 3 Dall., 382; *Brown vs. Keene*, 8 Pet., 112; *Ex parte Dunn*, 212 U. S., 374; *Dade Coal Company vs. Haslett*, 10 S. E., 435; *Grace vs. American Central Ins. Co.*, 109 U. S., 278; *Hanford vs. Davies*, 163 U. S., 273; *Jossey vs. Georgia Railroad Company*, 28 S. E., 283; *National Park Bank vs. Nichols*, 4 Bissell, 315; *New Orleans vs. Winter*, 1 Wheat., 91; *Texas and Pacific Railway Company vs. Interstate Commerce Commission*, 162 U. S., 197, 57 Fed., 948.

Argument.

An examination of the allegations of the Bill leads us to the conclusion that at the time the Bill was prepared and filed it was not then in the mind of the pleader that jurisdiction would be invoked by reason of diversity of citizenship. In the first place, as shown by the allegations of the Bill, it is specifically alleged that the Complainant, to-wit: the Bankers Trust Company, is a citizen of

the State of New York. It is, likewise, specifically alleged that defendant The New Orleans Pacific Railway Company is a citizen of the State of Louisiana. As to The Texas and Pacific Railway, complainant was content to allege that said corporation is created under the laws of the United States and, further, that it has its principal place of business, and principal operating and general offices in the City of Dallas, Texas, this being followed by an allegation that the said The Texas and Pacific Railway Company is a *resident* and *inhabitant* of the Dallas Division of the Northern District of Texas (Tr., 23).

It thus appears that the Complainant, for some reason, avoided any allegation that the Texas and Pacific Railway Company is a *citizen* of the State of Texas or any allegation that it *is not* a citizen of New York.

In *Hanford vs. Davies*, 163 U. S., 273, *Oct. Term, 1895*, Mr. Justice HARLAN stated (p. 279) :

> " It is well settled that, as the jurisdiction of a Circuit Court of the United States is limited in the sense that it has no other jurisdiction than that conferred by the Constitution and laws of the United States, the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears ; and, that it is not sufficient that jurisdiction may be inferred argumentatively from averments in the pleadings, but the averments should be positive."

Citing *Brown vs. Keene*, 8 Pet., 112 ; *Grace vs. American Central Insurance Company*,, 109 U. S., 278–283, and other authorities.

Again he says :

> " These principles have been applied in cases where jurisdiction of the Circuit Court was invoked upon the ground of diverse citizenship."

In *Grace vs. American Central Insurance Company*, 109 U. S., 278, *October Term, 1883*, the suit was commenced in the State Court of New York and thence removed, on the petition of the defendant, to a federal court. Complaint filed in the state court showed that the firm of Grace and Company, composed of William R. Grace, Michael P. Grace and Charles Flint, was doing business in New York, and that William R. Grace and Charles Flint were residents of that state. Petition for the removal of the cause showed the defendant was a corporation of the State of Missouri and alleged that William R. Grace and Charles Flint resided in New York, and that Michael P. Grace was a resident of some state or country unknown to defendant, but other than the State of Missouri. After stating these facts Mr. Justice HARLAN, speaking for this Court, said (p. 284):

> "The record, however, fails to show of what state the plaintiffs are citizens. They may be doing business in and have a residence in New York without necessarily being citizens of that state. They are not shown to be citizens of some state other than Missouri."
>
> Citing *Bingham vs. Cabot*, 3 Dall., 382.
> *Abercrombie vs. Dupuis*, 1 Cranch, 343, and other authorities.

And continuing further says:

> "It is true that the petition for removal, after stating the residence of the plaintiffs, alleges 'that there is and was, at the time that this action was brought, a controversy therein between citizens of different states,' but that is to be deemed the unauthorized conclusion of the law which the petitioner draws from the facts previously averred. Then there is the bond given by the defendant on the removal of the cause, which recites the names of the firm of Wm. R. Grace

& Co., and describes it to be as of the County of Kings and State of New York. If that bond may be considered as part of the record for the purposes of ascertaining the citizenship of the parties, the averment that the plaintiffs are 'of the County of Kings and State of New York' is insufficient to show citizenship."

A person may be a citizen of the United States and not a citizen of any particular State.

New Orleans vs. Winter, 1 Wheat., 91.
Feb. Term, 1816.

Reference is made to *Ex Parte* Dunn, 212 U. S., 374. That was a suit originating in the state court of Dallas County, Texas, and removed to the United States Circuit Court within the Northern District of Texas, and sitting at Dallas. The plaintiff contended that the Railway Company was an inhabitant of New York, and therefore could not have been originally sued in the Northern District of Texas, and urged the point that the case was not properly removable because the United States Circuit Court for the Northern District would not have had original jurisdiction. The Court, after reciting the facts shown, to-wit; that the Company maintained an office in Dallas County, Texas, and that the senior Vice-President lived there, and that, for many years, the Company had designated Dallas as its general office, held that the defendant company was liable to suit in the Northern District. No complaint is made of that decision, and it has no weight in the case at bar. The Circuit Court of the United States at that time had jurisdiction by virtue of the suit being one "arising under the laws of the United States."

As will be seen from a reading of the case, the question as to whether The Texas and Pacific Railway Company was a *citizen* of the State of Texas, was not involved and was not considered. It necessarily was conceded in the said case that by virtue of the Act of 1875 and acts amendatory thereto, a suit against The

Texas and Pacific Railway Company was a suit arising under the laws of the United States and some proper circuit court of the United States had jurisdiction. The question was whether the venue could be placed within the Northern District of Texas and sitting at Dallas, Texas. Certain acts of Congress divide Texas into various judical districts and certain acts of Congress prescribe where a defendant, in cases where the court has jurisdiction, may be sued.

It was held that a circuit court of the United States had original jurisdiction of the particular case and the only inquiry was whether such jurisdiction could be enforced within the Northern District of Texas. It was a question of venue alone and the court did not have to declare or even consider whether or not The Texas and Pacific Railway Company was a citizen of the State of Texas.

The case of *The Texas and Pacific Railway Company vs. Interstate Commerce Commission* (57 Fed. Rep., 948), is more in point. This suit was brought by the Interstate Commerce Commission against The Texas and Pacific Railway Company in the Southern District of New York under a statute which gave the Interstate Commerce Commission the power to sue either in the district where the alleged violation of law was committed or in the district where the defendant had its principal office. Jurisdiction of the suit against The Texas and Pacific Railway Company in the federal court within the Southern District of New York was maintained upon the ground that the railway company had its principal office in the City and State of New York. We quote from the decision:

> "This petition was brought in the Southern District of New York upon the ground that the principal office of the defendant (The Texas & Pacific Railway Company) was in New York, whereas it is said to be in Texas. The charter does not declare where the principal office of the company shall be. In fact the stockholders meet-

> ings and directors meetings are held in New York where also is the office of the President, Vice-President, Secretary and Treasurer of the company and where the stock certificate books and records of the stockholders and directors meetings are kept. The New York office is thus the domicile of the corporation and the principal office, while the general or administrative office, of the heads of departments are in Texas."

The court thus holding that the principal office and domicile of The Texas and Pacific Railway Company was in New York although it had a general administrative office in Texas, held jurisdiction to be maintained in the New York court. Upon appeal to the Supreme Court of the United States this was affirmed. (*The Texas und Pacific Railway Company vs. Interstate Commission*, 162 U. S., 204).

The incorporating act of The Texas and Pacific Railway Company provided that the Board of Commissioners should perfect the organization and meet in the City of New York within ninety days after the passage thereof and the books should be open for the subscription of capital stock and the annual meeting of the stockholders should take place as provided in the by laws of the company. In other words, the original incorporating act expressly provided for the beginning of its business affairs in the City of and State of New York. If therefore there be any force in the reasoning of appellant herein to the effect that a federal corporation is to be treated as a citizen of a state wherein it is *domiciled*, the line of reasoning would necessarily lead to the conclusion that the Texas and Pacific Railway Company, under the facts, is a citizen of the State of New York. As the appellant is shown by its pleadings also to be a citizen of the State of New York federal jurisdiction is at once ousted.

If diversity of citizenship is relied upon in the light of the facts shown by the pleadings as well as those of

which the Court must take judicial knowledge, is not appellant bound to show in specific terms that the suit is the between citizens of different states; is it not bound to allege and show that The Texas and Pacific Railway Company is not a citizen of the State of New York.

It will be noted that complainant was very careful to state that it is a citizen of the State of New York and that the New Orleans Pacific Railway Company is a *citizen* of the State of Louisiana, but the allegations with reference to The Texas and Pacific Railway Company were expressly guarded in that the allegations are that The Texas and Pacific Railway Company is a *resident* and *inhabitant* of the Dallas Division of the Northern District of Texas and it expressly omitted any allegation that The Texas and Pacific Railway Company was a citizen of the State of Texas. Again, in Paragraph 4 of the Bill, jurisdiction is asserted upon the ground that federal jurisdiction was conferred in express terms by the terms of the Act of the Incorporation and in Paragraph 36 it is expressly averred that the suit is one of a civil nature in equity involving an amount in excess of Five thousand Dollars ($5,000), and that the suit "arises under the Constitution and Laws of the United States." Nowhere in said bill is there any allegation that The Texas and Pacific Railway Company is a *citizen* of the State of Texas or that the District Court of the United States for the Northern District of Texas has jurisdiction of the cause by reason of the same being a suit between citizens of different states. Are we not irresistibly led to the conclusion that there was some method on the part of counsel for appellant in so studiously avoiding the issue as to whether or not The The Texas and Pacific Railway Company is a citizen of the State of Texas and whether or not it is a citizen of the State of New York. The Texas and Pacific Railway Company by virtue of the terms of its charter could as well have its principal place of business

in the City of and State of New York or elsewhere. It could as well carry on and transact its business so that if the law in any way could make it a citizen of any state, it could be considered a citizen of the State of New York where its principal offices are situated, where its Board of Directors meet and where its general affairs are conducted, rather than the place of the general or administrative office of the heads of de-departments.

In *Dade Coal Company vs. Haslett* (Ga. 10, S. E., 435) it appears that a mining company had located its offices in a certain city and county for the purpose of electing its officers and conducting its affairs. It had its operating offices in another county. A suit against the company in the county where it maintained its office for the election of officers and for conducting its financial affairs, was held to have been properly brought. In *Jossey vs. Georgia Railroad Company* (28 S. E., 273), the Supreme Court of Georgia drew a clear distinction between the principal office of the company and the administrative office. In other words, drew the same distinction as was done in the case of *The Interstate Commerce Commission vs. The Texas and Pacific Railway Company* (57 Fed. Rep., 948).

In the argument for appellant (Brief, pp. 60, 61, 62) reference is had to certain circuit court decisions to sustain the proposition that a national bank, although created by an Act of Congress, was treated and considered a citizen of the state in which it was located. These cases were rendered prior to the Act of 1887 (24 Stat., 552), in which it was provided that national banks, for the purposes of suits by or against them * * * should be deemed citizens of the states in which they were respectively located. It is evident this line of authority is cited to sustain the proposition that by similar reasoning The Texas and Pacific Railway Company, a federal corporation, should likewise be considered a citizen of the State of Texas where it is alleged to have had certain offices. While we do not concede the

correctness of the decisions cited nor accept them as final authority, yet a broad distinction between such federal corporations as a national bank and The Texas and Pacific Railway Company, a railway corporation, is to be noted.

The place of business of a national bank is confined by the terms of the law to some particular town or place in some particular state. It has no authority to have or establish any office at any other place whatsoever. It therefore follows that whatever weight is to be given to the decisions referred to by appellant must be considered in the light of the various national banking acts. In other words, by virtue of the said acts the principal office, residence and domicile of such banking association are necessarily fixed and confined to a particular state and in a particular location.

The reason of the decision holding that for purposes of jurisdiction national banks should be deemed citizens of the state in which they are established, is well stated in the case of *National Park Bank vs. Nichols*, 4 Bissell, 315 (1869), where Mr. Justice DAVIS sitting at Circuit said (pp. 315–6):

> "So far as the right to sue is concerned, it can make no difference that the bank is authorized by Congress instead of the Legislature of New York. If it is created by law, has its lawful place of business in New York and *nowhere* else and its corporators are citizens of the state, it can bring a suit in any circuit court of the United States outside of the State of New York. * * * There is no question but the Park Bank was authorized by Congress to transact business in New York and nowhere else and it therefore follows, as a legal presumption, that the shareholders of the bank are citizens of New York."

This is not true of The Texas and Pacific Railway Company. As hereinbefore recited, it has established

its principal office and domicile in the State of New York, which action is not contrary to the Act under which it was incorporated, nor of any law of the United States. It has the power to establish and maintain operating offices in the different states through which its line of railway extends.

Upon what principle can it be held to be a citizen of the state of Texas? Does it derive its corporate power from such state? Is it confined to the exercise of its corporate powers to the state of Texas? Can the state pass any law or procure any judgment through its courts by which charter could be forfeited? Then, again, if a citizen of Texas, why is it not a citizen of Louisiana for the same reasons? If a citizen of Texas, why is it not likewise a citizen of New York?

However, if by any line of reasoning a conclusion can be reached that a railway company incorporated by an Act of Congress is a citizen of one of the states of the Union, it must be on the principle that it has a certain fixed principal office and domicile in such a state. This office must be one where its corporate affairs are carried on and directed, and to which all other offices are subordinate. Certainly under the state of facts shown, before the trial court could maintain jurisdiction by reason of the diversity of citizenship the burden rested upon the pleader to show by express averments the citizenship of the defendant as being located in the state where the suit was brought, and likewise to exclude any presumption that the defendant was a citizen of a different state from that of the plaintiff.

It is our contention, however, that the railway corporation created by an Act of Congress and having the power to operate its line of railway in more than one state, and having even the power to maintain its principal office and domicile in a state other than the state or states in which it may own and operate lines of railway, shall be treated and declared a citizen of no state, for in truth and fact it is not. Its corporate power of existence is derived from Congress. This

corporate power is just as strong and has the same force and effect in one state as it has in the other, and no state can in any way impair the rights granted by Congress nor exclude it from its domain.

In the case of Scott vs. Choctaw, Oklahoma and Gulf Railroad Company (112 Fed., 180), it appeared that suit was brought against the Choctaw, Oklahoma and Gulf Railway Company, a federal corporation, and the Choctaw, Oklahoma and Memphis Railway Company, a state corporation. The federal corporation sought to remove the case from the state court on the ground of a separable controversy. It was contended that the federal corporation was not a citizen of any state and therefore could not remove on the ground of a diversity of citizenship. In the trial the district judge said :

> " In the case at bar the suit is not between citizens of different states because one of the defendants is a federal corporation and the other a state corporation."

For the foregoing reasons and upon the foregoing authorities the appellee asks that the decree of the District Court be affirmed.

Respectfully submitted,
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Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 889.

BANKERS TRUST COMPANY, as Trustee,
Appellant,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY and NEW ORLEANS PACIFIC RAILWAY COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION.

ADDITIONAL BRIEF ON BEHALF OF APPELLEE, THE TEXAS AND PACIFIC RAILWAY COMPANY.

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Supreme Court of the United States.

OCTOBER TERM, 1915. No. 889.

BANKERS TRUST COMPANY, as Trustee, Appellant,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY and NEW ORLEANS PACIFIC RAILWAY COMPANY.

ADDITIONAL BRIEF ON BEHALF OF APPELLEE, THE TEXAS AND PACIFIC RAILWAY COMPANY.

This is an action brought in the District Court of the United States for the Northern District of Texas by Bankers Trust Company, a corporation of the State of New York, against The Texas and Pacific Railway Company, a railroad corporation created under certain Acts of Congress of the United States, to foreclose a mortgage made by the Railway Company under the authority contained in said Acts of Congress.

The sole question presented to this Court for its decision is, whether the District Court of the United States for the Northern District of Texas has jurisdiction of this action under the provisions of the Act of Congress approved January

28, 1915; and the question is therefore one of statutory construction as to the meaning and effect of that Act.

It is conceded that if the action had been instituted before the approval of the Act of January 28, 1915, the Court below would have had jurisdiction, for the reason that the Railway Company is incorporated under an Act of Congress and that a suit by or against it necessarily involves a controversy arising under the Constitution and laws of the United States, thus conferring jurisdiction on the Federal Courts.

This jurisdictional right or privilege was judicially determined by this Court in the *Pacific Railroad Removal Cases* (115 U. S., 1), the decision of the Court in those cases being based upon the doctrine announced in the case of *Osborn vs. Bank of the United States* (9 Wheat., 738).

The Pacific Removal Cases.

The principle in question involved in these cases was, whether a suit brought in a State Court against a corporation of the United States might be removed by such corporation into the Federal Court on the ground of its being a corporation organized under the law of the United States. The particular corporations concerned in these cases were the Union Pacific Railway Company and The Texas and Pacific Railway Company, and the suits were all brought originally in State Courts and removed by the defendant corporations into the Federal Courts.

In holding that the defendant corporations were entitled, as corporations created by and organized under Acts of Congress, to remove into the Federal Courts suits brought against them in the State Courts, this Court based its decision upon the case of *Osborn vs. Bank* and said :

> " An examination of those acts of Congress shows that the corporations now before us, not only derive

their existence, but their powers, their functions, their duties, and a large portion of their resources, from those acts, and, by virtue thereof, sustain important relations to the Government of the United States."

Osborn vs. Bank.

In this case the question considered and decided was, whether a case in which a United States bank was a party was, for that reason, a case arising under the laws of the United States ; and, in so holding, this Court said :

"The charter of incorporation not only creates it (the United States Bank), but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law. Can a being, thus constituted, have a case which does not arise literally as well as substantially under the law ? Take the case of a contract, which is put as the strongest against the bank.

"When a bank sues, the first question which presents itself, and which lies at the foundation of the cause, is, has this legal entity a right to sue ? Has it a right to come, not into this court particularly, but into any court ? This depends on a law of the United States. The next question is, has this being a right to make this particular contract ? If this question be decided in the negative, the cause is determined against the plaintiff; and this question, too, depends entirely on a law of the United States. These are important questions, and they exist in every possible case."

The sole question, therefore, for determination is, as above stated :

Has the jurisdiction of the Federal Courts over cases by or against The Texas and Pacific Railway Company, heretofore existing, as judicially determined by this Court, been taken away by the Act of Congress of January 28, 1915 ?

It will not be disputed that Congress had the power and right to so restrict the jurisdiction of the Federal Courts whether or not such action on its part would be equitable or inequitable, the question being not what Congress should do, or should have done, but only what it actually accomplished.

The Section of the Act of January 28, 1915, under consideration reads as follows :

> " No Court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that said railroad company was incorporated under an Act of Congress."

Contention is made that the real purpose and object was to prevent the Texas and Pacific Railway Company from exercising any greater rights of removal of causes into the Federal Courts than were possessed by other railroad corporations, and in support of this contention reference is made to the reports of committees and other proceedings and debates in Congress.

In construing this Act of Congress the same rules of interpretation as those affecting any other written instrument must be applied, and where the language of the instrument is clear and unambiguous its meaning and intent must be determined by attributing to these words their usual and customary significance, with the assumption, also, that each word employed is to be considered in arriving at a proper construction of the entire instrument.

In the present case the language employed by Congress is

clear and unmistakable, and it must be assumed that it adopted the Act in question with full knowledge on its part of the scope and effect of all decisions theretofore rendered by this Court relating to the subject-matter of the Act.

The Act of January 28, 1915, deprives the Federal Courts of *any* action or suit *by* or *against* any railroad corporation upon the ground that it is incorporated under the laws of the United States. An action brought by any such railroad corporation would certainly not be one involving the corporation's right of removal, but would be an original action instituted by it in which the jurisdiction of the Federal Court was invoked by the Federal corporation.

A suit *against* such a railroad corporation might also be a suit where such jurisdiction was claimed by the adverse party to enforce a claim or demand against the Federal corporation.

As has been determined by this Court in the cases above cited, the power to create the jurisdiction existing in the Federal Courts prior to the passage of the Act of January 28, 1915, rested solely on the truth of the proposition that a suit *by* or *against* Federal corporations would be a suit arising under the laws of the United States.

Before the passage of the Act of January 28, 1915, jurisdiction of the Federal Courts could be invoked in all suits against The Texas and Pacific Railway Company because it was incorporated under Acts of Congress, and to that authority owed the possession of all of its faculties. Jurisdiction of the Federal Courts upon this ground was expressly, and by unmistakable terms, taken away by the Act of January 28, 1915.

The Congressional legislation affecting national banks and the judicial construction of such legislation, though interesting historically, has no bearing or application as a precedent in determining the question now presented.

The Act of January 28, 1915, is now presented, for the first time, for judicial construction. Prior to its passage

Federal jurisdiction existed in suits by or against Federal railroad corporations. Since its enactment Federal jurisdiction over suits by or against such corporations has been restricted. Is the present suit one of which the Federal Court has been deprived of jurisdiction by the Act? This is the only question for determination.

It is further contended that the Act of 1915 deprived the Federal Court of jurisdiction over cases by or against Federal corporations where jurisdiction of such cases was theretofore based upon the sole fact that one of the parties was created by Act of Congress. But the *origin* alone of the party never created jurisdiction, but rather the fact that its every act grows out of the law of its origin and must be tested and construed by it.

Assuming, as we must, that the Act of 1915 was intended to limit or restrict a jurisdiction previously granted to the Federal Courts, its operation and scope must be applied to a jurisdiction of suits involving acts of Federal railroad corporations arising out of the laws of their incorporation.

It is submitted that the question now presented may be answered briefly as follows:

The jurisdiction of the United States Courts, judicially determined to exist by the Osborn case and reiterated in the Pacific Removal Cases, was taken away as to cases by or against Federal railroad corporations by the Act of Congress January 28, 1915.

Jurisdiction of this action, on the ground of diverse citizenship, is urged in the appellant's brief, but with little vigor. In answering this contention it is perhaps sufficient to call to the intention of the Court that the necessary allega-

tions in this respect do not appear in the bill of complaint; at best it can only be said that allegations are made of *venue*.

If, however, in determining the question of jurisdiction it becomes necessary or desirable for this Court to judicially establish the citizenship of The Texas and Pacific Railway Company for jurisdictional purposes, then it is submitted that the domicile of the Company for that purpose should be fixed in the State of New York.

It is true that the lines of railroad of The Texas and Pacific Railway Company, as presently established, are located in the States of Texas, Louisiana and Arkansas, and that the greater part of its mileage is located in the State of Texas. It is also true that the offices of its chief accounting officer and General Superintendent are situated in that State. The offices of the First Vice-President (the principal operating officer), the General Traffic Manager (the principal traffic officer) and the General Solicitor (the principal legal officer), however, are situated in the State of Louisiana. In the State of New York the general executive offices of the Railway Company are maintained. The Chairman of the Board, the President, a Vice-President and the Secretary and Treasurer have their offices in New York City. The Board of Directors of the Company holds its meetings in New York, and at that place also the stock of the Company is transferred, interest on its bonded indebtedness is paid, its principal bank deposits are maintained and its treasury securities are kept. In other words, the executive headquarters of the Railway Company, where the policy of its business is determined and its financial affairs are directed, is and has been, since the incorporation of the Railway Company, established and maintained in the City of New York.

These facts, although not appearing in the record, will not be disputed and are matters of common knowledge.

The question of domicile of The Texas and Pacific Rail-

way Company, for jurisdictional purposes, is a question which has heretofore received the consideration of this Court.

By the provisions of the Interstate Commerce Act it was provided that if any common carrier subject thereto shall neglect to obey any lawful order of the Commission it shall be lawful for the Commission to proceed against such carrier in the Circuit Court of the United States sitting in equity, "in the judicial district in which the common carrier complained of has its principal office."

Such a proceeding was instituted by the Commission against The Texas and Pacific Railway Company, in the year 1892, in the Circuit Court of the United States for the Southern District of New York. The Railway Company objected to the jurisdiction of the Court, and the Circuit Court of Appeals, in upholding such jurisdiction, said in its opinion (*Interstate Commerce Commission vs. Texas and Pacific Railway Company*, 57 Fed. Rep., 948–955):

> "This petition was brought in the Southern District of New York, on the ground that the principal office of the defendant was in the City of New York, whereas it is said to be in Texas. The charter does not declare where the principal office of the defendant shall be. In fact, the stockholders' meetings and directors' meetings are held in New York, where also is the office of the president, first vice-president, secretary, and treasurer of the company, and where the stock certificate books and records of the stockholders' and directors' meetings are kept. The New York office is thus the domicile of the corporation, and the principal office, while the general or administrative offices of the heads of departments are in Texas."

On appeal to that Court (*Texas and Pacific Railway Company vs. Interstate Commerce Commission*, 162 U. S., 197) this Court sustained the ruling of the Court below on this point.

It is submitted, however, that the matter of diversity of citizenship as a basis of jurisdiction of the Federal Courts has

no application or relevancy in connection with suits by or against The Texas and Pacific Railway Company.

Before the passage of the Act of January 28, 1915, jurisdiction of the Federal Courts over actions by or against railroad corporations incorporated under Acts of Congress did not exist upon the ground of diverse citizenship, but rested, exclusively, upon the truth of the proposition that all actions by or against such railroad corporations arose under the Constitution or laws of the United States.

Jurisdictions of actions by or against such railroad corporations on the ground of diversity of citizenship was certainly not created or attempted to be created by the terms of the Act of January 28, 1915.

The truth of the first proposition was declared by this Court in that portion of the opinion in the Pacific Removal Cases (*supra*) where the decision of this Court in the Osborn case is analyzed. In classifying the cases—four in number and one embracing controversies between citizens of different states—to which the judicial power of the United States is confined by the Constitution, this Court pointed out that suits by or against the United States Bank could not possibly belong to any of these classes except the one which included cases arising under the Constitution and laws of the United States, and said (p. 12):

> "Unless, therefore, a case in which the bank was a party was for that reason a case arising under the laws of the United States, Congress would not have had the power to authorize it to sue and to be sued in the Circuit Court of the United States."

This fundamental principle was the entire foundation upon which the jurisdiction of the United States Courts over suits by or against Federal railroad corporations rested by the decision of this Court in the Pacific Removal Cases.

It may be that an additional basis for such jurisdiction has

been established by Congress through subsequent legislation in the case of national banks, and could be so established in the case of Federal railroad corporations. The fact remains, however, that as to Federal railroad corporations no such legislation has been enacted since the decision of this Court in the Pacific Removal Cases, and that, therefore, diversity of citizenship should be excluded as forming a basis of Federal jurisdiction of actions by or against such corporations, such jurisdiction, until the passage of the Act of January 28, 1915, remaining founded upon the sole ground that such suits necessarily arose under the Constitution or laws of the United States.

The Act of January 28, 1915, was one which did not enlarge but rather restricted the jurisdiction of Federal Courts over suits by or against Federal railroad corporations.

The Texas and Pacific Railway Company was created and remains a citizen of the United States, and has not been jurisdictionally domiciled or established, either by statute or Court decision, as a citizen of any state.

In pointing out to the Court the perplexing jurisdictional situation which has been created by the passage of the Act of January 28, 1915, and in suggesting that the proper construction to be placed upon that Act will necessarily deprive the Court below of jurisdiction of this action, it must not be supposed that the parties are moved by any feeling of preference for any other tribunal; quite the contrary is the fact.

The questions involved in this action are of the highest importance as well as of great financial magnitude. Their submission to the United States District Court for the Northern District of Texas would assure a judicial determination controlled by the application of profound legal learning and wide experience on the part of that Court. It is obvious,

however, that—as much in the interest of that Court as for the protection of the rights of the parties—it is essential that its decision should rest upon the sound foundation of an established jurisdiction.

Respectfully submitted,

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